A NEW SCHEME OF REORGANIZATION.

Writing from ten years of unusually wide and varied judicial experience relating to corporate insolvency and reorganization in this country, that forceful and learned jurist, Charles M. Hough, recently observed:[1]

"There is a good deal to be said in favor of a new scheme of law which would in some way confer upon an impartial and disinterested tribunal the entire supervision of corporate reorganization * * *. But no such system of legal procedure now exists."

Is it, then, a fact, as Judge Hough's words indicate, that present reorganization methods in this country are unsound and defective? If so, in what respects? Can a workable, effective and constitutional substitute be devised?

It is to suggest answers to these inquiries that this article is written.

I. PRESENT CONDITIONS.

(a) RECEIVERSHIP.

A corporation finds itself in financial embarrassment. It has a floating debt, several classes of bond and note issues (some secured, others unsecured), and several classes of outstanding stock. A friendly equity suit is instituted in the federal court, the basis of jurisdiction being diversity of citizenship.[2] The complainant, a creditor, alleges that the corporation is financially embarrassed and asks that the assets be marshalled, liquidated and distributed, and that receivers be appointed to continue the business pending the sale of the property. The defendant admits the allegations of the complaint, consents to the relief sought and thereupon the court appoints receivers who take possession of the defendant's assets and continue the business. Where necessary, the receivers obtain leave of the court to borrow money on receivers' certificates to enable the business to be continued. When the public interest requires the continuance of the business, these certificates create a prior lien on all the corporate assets, ranking ahead of mortgages; but otherwise it appears they are not so secured.[3]

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[1]Guaranty Trust Co. *v.* International Typesetting Co., U. S. D. C., Southern District of New York, February 19, 1916, (not reported).

[2]*In re* Metropolitan Ry. Receivership (1908) 208 U. S. 90, 28 Sup. Ct. 219.

[3]Wallace *v.* Loomis (1877) 97 U. S. 146; Cake *v.* Mohun (1896) 164 U. S. 311, 17 Sup. Ct. 100.

The creditors and stockholders are enjoined from bringing suits against the defendant or interfering with the receivers; and, where the defendant's assets are located in districts beyond the jurisdiction of the court, ancillary receivership suits are instituted.

(*b*) COMMITTEES.

Self-constituted committees of the various classes of creditors and security holders are formed, generally by leading representatives of such classes, or by bankers who issued the securities,—now and then by small holders. The committees, through the mails and advertisements seek the deposit with them of the classes of securities they assume to represent. The deposit is made under the terms of an agreement clothing the committees with almost unlimited powers. With the aid of counsel and accountants they study the affairs of the insolvent company—its assets, liabilities, past earnings, fixed charges, causes for insolvency and prospect for future success. If the committees conclude that the business is worth saving, they negotiate with one another as to the terms of a reorganization. These negotiations involve many questions as to the extent and priority of liens of secured creditors, requisite amounts of new capital, who is to furnish it and on what terms, how far creditors and stockholders are to scale down their holdings and be called on to furnish new capital, the amount and character of new securities to be issued to the old security holders and new investors, the fees and commissions of the committees, depositaries, counsel, bankers, etc. At last the committees agree. A reorganization plan is prepared; and a formidable document is printed. Representatives of the respective committees are selected to act as a joint reorganization committee, or bankers are selected to act as reorganization managers. Those security holders who have deposited their claims with their respective committees are asked to approve the plan, or, to state the matter more accurately, are informed that, pursuant to the agreement under which they have made deposit, they will be deemed to have assented to the plan unless they withdraw their securities from their committees and pay their share of their committee's expenses.

(*c*) MORTGAGE FORECLOSURE.

A trust company, which is trustee for the mortgage bondholders, has meantime obtained leave from the federal court to foreclose its mortgage in that court. The foreclosure proceedings drag their

weary and extravagant length through the court while the plan is being developed, and in due course a decree of foreclosure and sale of the property is made.

(*d*) SALE.

The receivers offer the property for sale, complying as far as is feasible and necessary with a stupid and burdensome statute enacted in 1893.[4]

There is rarely any competition at the sale, for the property is so vast that there is no one to purchase it except the old security holders. The reorganization committee buys in the assets. It pays actual money only to the extent of furnishing the cash distributive share, as fixed by the court, to the security holders who do not assent to the reorganization.

Thus, as, in a simple real estate foreclosure, a mortgagee may bid in the mortgaged property, crediting upon his bond the amount of his bid and paying no actual money except for the fees of the referee and the expenses of the sale, etc.; so, in the case of a purchase by a reorganization committee, the committee delivers to the receivers the securities of the assenting security holders, paying in actual money only for the non-assentors and for the administrative expense. If, to illustrate, the insolvent corporation has a first mortgage bond issue of ten million dollars, and nine million dollars of the bonds have come into the plan, and the committee bids five million dollars for the mortgaged assets, that means roughly 50% to the bondholders; but as nine million dollars of the bondholders have assented to the new plan, whereunder they will receive new securities of a new corporation, the 50% in actual money need be paid only to the one million dollars of non-assenting bondholders.

This same general plan is carried out in industrial reorganizations where there are no bond issues, but merely unsecured debts. In such cases, there has developed within the last five years, a practice of making what is called a percentage bid. Thus, in the reorganization of the H. B. Claflin Company, the reorganization committee made a bid to the receivers to pay in full all claims entitled to priority of payment (such as taxes, fees and expenses of administration, etc.), and also to pay all general creditors 29% of the face of their claims. The debts were about $40,000,000. The bidder was, therefore, offering something like $12,000,000 for the assets. In point of fact, as practically all the creditors had entered

[4] 1 U. S. Comp. Stat. (1913) §§ 1640-1642.

the reorganization, the bidder delivered to the receivers receipts from the assenting creditors for their 29%. Therefore, the bidder, instead of paying something like $12,000,000 to the receivers, paid only 29% of the claims of the non-assenting creditors—a nominal amount; and the assenting creditors did not receive 29%, but instead the securities called for by the plan.

In substance, then, the bid in all reorganizations is made by a committee which represents a great majority of security holders. If the bid is accepted, the bidder assigns his bid to the new corporation, formed pursuant to the plan. The new corporation thus becomes vested with the assets of the insolvent corporation and issues securities to the creditors and stockholders of the old company and to the investors of new capital, pursuant to the terms of the reorganization plan. Business goes on without a moment's interruption; and the only visible change is that whereas the old establishment bore the name "Eastern Traffic Company", the handsomely engraved letter-head of the newly created entity is "Eastern Traffic Corporation".

(*e*) DANGER OF INVALIDITY OF SALES TO REORGANIZATION COMMITTEES.

Reference has just been made to the fact that it rarely happens that there are any outside competing bids. Foreclosure sales to committees have indeed become little more than a form,—a method not for sale, but for accomplishing reorganization. Through this fact there have developed a number of decisions, the most important of which is the Boyd case.[5] There, a sale to a reorganization committee, effected years before, was held not to be genuine, but only a step in a reorganization, "a mere form", so that non-assenting creditors, who were frozen out through a reorganization which gave stock in the new company to stockholders of the old, were adjudged to hold valid and enforcible claims against the new company, formed as a result of the purchase by the reorganization committee. This important case, followed by another decision along the same lines,[6] has subjected reorganizations by foreclosure sale to serious danger of subsequent destructive attack, and indeed is a very nightmare to counsel who have to do with modern reorganizations.

[5]Northern Pacific Ry. *v.* Boyd (1913) 228 U. S. 482, 33 Sup. Ct. 554.

[6]Kansas City Southern Ry. *v.* Guardian Trust Co. (1916) 240 U. S. 166, 36 Sup. Ct. 334.

(*f*) LACK OF CONTROL BY COURT.

The terms of the reorganization, it will be perceived, have been wholly a matter of private negotiation among the committees. The court's hollow part has been to appoint receivers, and enjoin creditors and stockholders in order to hold the property free from attack; then, by decree of sale, to sanction the turning over of the property to the reorganized company.

Over such reorganizations the courts have no direct power of approval or disapproval.[7] In a left-handed way, however, enlightened federal judges have found methods of exerting some power. They can refuse to order or confirm the sale and can permit or refuse applications of minority interests to intervene in and become parties to the suit. These mere veto authorities are used beneficially for constructive purposes by those progressive and far-seeing federal judges who have come to realize the necessity of judicial supervision over reorganizations and who are devising ways to meet that need, at least in part. Thus in November, 1916, to cite a recent instance, a motion was made before Judge William C. Hook (who is a leader of modern thought on the subject) to strike from the files an intervening petition of a committee of bondholders who objected to the reorganization plan of the Missouri Pacific Railroad. Far from declaring, as might have been done by some judges, that the suit was merely one to foreclose a mortgage and that the court had nothing to do with the reorganization, Judge Hook went to the root of the plan. "At the threshold" he wrote "lies the question of the relation of a court which appoints receivers * * * to a reorganization * * *. * * * bondholders have a right, upon default, to a strict foreclosure and sale * * *. But in practice * * * that is rarely done in these days. It has sometimes been claimed that plans of reorganization * * * are exclusively of private concern, free from judicial interference. * * * the view cannot be sustained * * *. While it is the settled doctrine that reorganizations will be encouraged * * * a court of equity will not lend its aid to one that is inequitable or oppressive."[8]

Fortunately our federal courts are giving increasing recognition to these sound views. This means that honest minorities who become vocal have a chance to exact modifications in an unjust

[7]Merchants' Loan & Trust Co. *v.* Chicago Rys. (C. C. A. 1907) 158 Fed. 923-929.

[8]Guaranty Trust Co. *v.* Missouri Pacific Ry. (D. C. 1916) 238 Fed. 812, at pp. 814-815.

plan. But it affords no means of compelling an unruly minority to accept a fair plan, and no means of protection, by judicial examination of the plan, to the thousands of assentors who have deposited their claims and, despairing of comprehension of the modern intricate type of reorganization, follow their committees like dumb sheep. Indeed, it is a far cry from that desirable condition, and not an Utopian one, as it is hoped will be demonstrated, where a court has direct supervision over the plan, gets rid of the silly sham of foreclosure, and has power to enforce on a minority a scheme of reconstruction approved by a substantial majority and found by the court to be fair to all interests.

(*g*) MINORITY INTERESTS.

Judge Hough, in the opinion quoted from at the beginning of this paper, speaks of the frequent "tyranny and extravagance" of reorganization committees. Such committees are composed of human beings with ordinary human frailties. They are obliged, under existing conditions, to pay cash to the non-assenting minorities. Is it to be wondered at if they try to pay as little as possible; if they use their power tyrannically at times? They are entitled under the terms of the reorganization agreement to compensation for their services; this, they themselves fix. Is it to be expected that men will undervalue their own services? Judge Hough's words were justified. But the fault lies in the system; and that same system produces even more serious evils in affording splendid opportunities to selfish minority interests to adopt dilatory, obstructive and piratical tactics, delay the consummation of sound constructive plans and in a thousand ways build up a "nuisance value" for the sole purpose of being bought off.

(*h*) SUMMARY OF EVILS OF PRESENT SYSTEM.

The court has no direct supervision over the plan; it has no sufficient authority to deal with oppression by majorities or destructive methods by the few. The estate is wasted by the expense of needless foreclosure and ancillary receiverships; if the ancillary receivers are not the same persons as the original receivers, the corporate assets may be destroyed by conflicting policies of administration; if receivers' certificates can not be secured by valid first liens, the business may actually have to be suspended at irreparable loss because of lack of working funds. Committees have practically unlimited power to determine the plan, fix fees and com-

missions for themselves, their bankers, counsel, etc. The inducement to security holders to assent to a plan if approved by a disinterested tribunal is wanting; the sale is in genuine danger of attack years after it has been made; and, most serious of all, there is no way, except in a negligible number of cases where reorganization can be effected through composition in bankruptcy, of enforcing on a minority an honest and advantageous plan approved by the majority.

II. An Adequate Scheme.

Reference has just been made to compositions in bankruptcy. In the ordinary commercial failure, wherein all creditors are unsecured, such compositions, enforcing on the minority, even over their objections, a compromise accepted by the majority and sanctioned by the court, are of daily occurrence. How do such cases differ from corporate reorganizations? In two respects: first, in that a composition is a petty affair involving mere thousands of dollars while the word reorganization denotes millions,—something splendid, shedding lustre upon and enriching the fortunate participants; second, in that the corporate reorganization deals with and readjusts the rights and liens of secured creditors and stockholders as well as of unsecured creditors.

Can Congress lawfully enact an amendment to the Bankruptcy Statute requiring stockholders and entire classes of secured creditors to accept what their majorities are content to take; and thus deprive the minority of their share of the security? Or would such legislation amount to confiscation; to the taking of property "without due process of law"? It is upon the answer to these questions that a real and far-reaching solution of our problems hinges. The approach to that answer, it is submitted, should be made in the spirit of the great opinion of Chief Justice Marshall in the case of *Sturgis* v. *Crowninshield.*[9] A century ago he said that the bankruptcy law is "one on which the Legislature may exercise an extensive discretion". Before examining the constitutional limitations upon such an "extensive discretion" let us turn to Great Britain.

The British Companies Act was consolidated in 1908. Section 120 thereof is, with slight change, a reenactment of a statute adopted in 1870. That section provides that

(1) "Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the

[9](1819) 17 U. S. 122.

company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member, * * * order a meeting * * *."

(2) "If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members * * * agree to any compromise or arrangement, the compromise or arrangement, shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members * * * and on the company * * *."

In 1870 the Statute was made to apply only to creditors and classes of creditors. In 1900 it was enlarged to apply to members and classes of members. That brief, meaty piece of legislation has for almost half a century afforded a complete scheme of reorganization requiring the minority of secured as well as unsecured creditors to accept what a majority in number, representing three-quarters in amount, approve when the plan is sanctioned by the court.

This statute was attacked in Great Britain by secured creditors as confiscatory and therefore invalid. Curiously enough it was in the reorganization of an American enterprise that this attack was dealt with and settled by the British courts. The case has the exceedingly domestic title *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company.*[10]

In 1881 this company had been formed under the Joint Stock Company Act of Great Britain. Two sets of debentures had been issued; the first "constituted a first charge upon the whole of the company's assets"; the second "a second charge" thereon.[11]

"The company's property comprised shares * * * of four American railroad companies, and the scheme of the company was to acquire and hold so much of the shares and securities of those four companies as would give the company the virtual control of the four companies, and in that manner to ensure that the four companies * * * should be conducted in the manner best calculated to promote the interests of all."[12]

A modern and very home-made sound has this, with plenty of local color.

In 1885 the company became embarrassed. A plan of reorganization was prepared and was submitted to the British courts

[10][1891] 1 Ch. 213.
[11]At p. 214.
[12]At p. 215.

pursuant to the statute quoted. The plan is fully set forth in the opinion.[13] Provision was made for "A", "B" and "C" series of debentures; for the surrender of the old first and second debentures, the holders thereof to receive in exchange chiefly the new securities plus a little encouragement in the shape of one pound, ten shillings in cash for each one hundred pound debenture, etc. Unsecured creditors were offered "C" debentures, but no cash. The lower court confirmed the plan. Two dissenting debenture holders appealed. Their counsel argued that:[14]

"the Court has no jurisdiction * * * to sanction a scheme which affects the interests of debenture-holders * * *. * * * the Court has no jurisdiction to deprive them of the benefit of their security * * *."

The case aroused great interest for the statute did not in terms assume to deprive secured creditors of their security. All three of the learned judges who sat in the case on appeal wrote opinions. From these we may quote as follows:

Lindley, *L. J.*, said:[15]

"* * * secured creditors, whether secured by covering deeds, debentures, or otherwise, are within the Act * * *. * * * the Court can sanction a scheme when it is approved by the proper majority, even against the will of a minority."

Bowen, *L. J.*, argued with cogent common sense:[16]

"I do not think myself that the point of jurisdiction is worth discussing at much length, because everybody will agree that a compromise or agreement which has to be sanctioned by the Court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides * * *. * * * it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights."

[13]At pp. 216-218.
[14]At pp. 231-232.
[15]At p. 237.
[16]At p. 243.

Fry, *L. J.*, made little of the question of jurisdiction, saying that it is:[17]

"plain that this case is one which is within the jurisdiction of the Court."

Palmer, in his learned treatise on the British Companies Act,[18] discusses fully the manifold kinds of arrangements that have been approved by the courts under the quoted statute. Thus in the case of *In re Empire Mining Company*,[19] dissenting debenture holders were made to "give up their so-called security" and take "shares in the new company." The learned *Q. C.*,[20] who on behalf of "a debenture-holder to the amount of £250" sought to upset the plan and who urged "there is no jurisdiction under the Act to take away from secured creditors their security, without their consent" was bowled over by the court, and so the insignificant interest, which doubtless for purely unselfish motives raised jurisdictional questions, received refreshingly short shrift.

In a word then, the British courts have ever since 1870 held that mortgage creditors may have their mortgage taken away from them and may even be required to accept nothing better than shares in the new company. Thus the principle of permitting the court to enforce equality on all has flourished, and a simple way has been found to offer new money a prior lien.

Can our own Congress accomplish without violation of the Federal Constitution what Parliament has done? Two questions are presented. The first is whether such a statute would be invalid as a law impairing the obligation of a contract. To that a sufficient answer lies in the fact that this constitutional inhibition is directed not against Congress but only against the states; that a bankruptcy statute does impair contract rights but is none the less constitutional; that Chief Justice Marshall firmly fixed the principle in *Sturgis* v. *Crowninshield*[21] that a bankruptcy statute is valid though impairing the obligation of contracts; that the Supreme Court has since then forcibly reiterated the same doctrine,[22] though at the same time pointing out that the states as distinguished from Congress cannot impair contract rights,[23] and that composi-

[17]At p. 246.

[18]1 Palmer, Company Precedents (10th ed.) 430-432.

[19](1890) 44 Ch. D. 402.

[20]At p. 407.

[21]*Supra,* footnote 9.

[22]Canada Southern Ry. *v.* Gebhard (1883) 109 U. S. 527, 3 Sup. Ct. 363.

[23]Gilfillan *v.* Union Canal Co. (1883) 109 U. S. 401, 3 Sup. Ct. 304.

tions in bankruptcy are valid whether requiring objecting minorities to accept in discharge of their claims money or even notes for less than par of their claims.[24]

It is in the Fifth Amendment which declares that no person shall be "deprived of life, liberty or property without due process of law" that the real question lies, for this inhibition would make void confiscatory legislation. A determination of that problem, then, requires a consideration of the meaning of "due process of law" in the present connection. And thus we hark back to Magna Charta.

Magna Charta declared (translating literally):

"No freeman shall be * * * disseised * * * unless by the judgment of his peers or by the law of the land."

Our Supreme Court has settled[25] that

"The words, 'due process of law', were undoubtedly intended to convey the same meaning as the words, 'by the law of the land', in *Magna Charta*".

Lord Coke[26] says the phrases have the same meaning.

The constitutions which had been adopted by the several states before the enactment of the Federal Constitution, following Magna Charta more closely, generally contained the words "law of the land". It is therefore established that "due process of law" and "law of the land" are synonymous phrases.

If, then, the British Arrangements Act was not thought by Parliament or the courts violative of Magna Charta, by a parity of reasoning, like legislation by Congress would not be in violation of due process of law. But, since Parliament is supreme, while Congress is limited by a written constitution, we must not rest our argument on analogy. Nor need we. Our Supreme Court has dealt with the very problem before us.

In the case of *Canada Southern Ry.* v. *Gebhard*,[27] a railway company, incorporated in Canada, had issued mortgage bonds payable in New York City. The company became embarrassed and a plan of reorganization was formulated and approved by the Parliament of Canada. The scheme required all the bondholders to surrender their mortgage bonds and accept new securities of a reor-

[24] *In re* McNab & H. Mfg. Co. (1878) 16 Fed. Cas. No. 8906; *In re* Kinnane Co. (1914) 3 Am. B. R. 243.

[25] Murray's Lessee *v.* Hoboken etc. Co. (1855) 59 U. S. 272, at p. 276.

[26] 2 Inst. 50.

[27] *Supra*, footnote 22.

ganized company, pursuant to a plan approved by the majority. Objecting bondholders, who were citizens of the State of New York, claimed they were not bound by the plan. Mr. Chief Justice Waite, delivering the Court's opinion, reviewed the entire subject. He declared that two questions were presented:[28]

"1. Whether the 'Arrangement Act' is valid in Canada, and had the effect of binding non-assenting bondholders within the Dominion * * *.

2. Whether, if it did have that effect in Canada, the courts of the United States should give it the same effect as against citizens of the United States whose rights accrued before its passage."

The learned justice first points out that there is "no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts",[29] and follows this by saying that similarly Congress may impair such rights.

He then discusses the Arrangement Statute of Great Britain which has been quoted in this article declaring[30] that "the parliamentary authority for such legislation has never been doubted either in England or Canada"; points out[31] that "In the absence of statutory authority * * * nothing can be done by a majority, however large, which will bind a minority without their consent", and adds on this branch of the subject:[32]

"Hence it seems to be eminently proper that where the legislative power exists some statutory provision should be made for binding the minority in a reasonable way by the will of the majority; and unless, as is the case in the *States* of the United States, the passage of laws impairing the obligation of contracts is forbidden, we see no good reason why such provision may not be made in respect to existing as well as prospective obligations. The nature of securities of this class is such that the right of legislative supervision for the good of all, unless restrained by some constitutional prohibition, seems almost necessarily to form one of their ingredients, and when insolvency is threatened, and the interests of the public, as well as creditors, are imperilled by the financial embarrassments of the corporation, a reasonable 'scheme of arrangement' may, in our opinion, as well be legalized as an ordinary 'composition in bankruptcy'. In fact, such 'arrangement acts' are a species of bankrupt acts. Their object is to enable corporations created for the good of the public to relieve themselves from financial em-

[28]At p. 532.
[29]At p. 532.
[30]At p. 534.
[31]At p. 535.
[32]At p. 535.

barrassments by appropriating their property to the settlement and adjustment of their affairs * * *." (Italics are the author's.)

Finally the Court, discussing the rights of the mortgage creditors before it, arrives at the far reaching conclusion:[33]

"The confirmation and legalization of 'a scheme of arrangement' under such circumstances is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. * * * The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained."

The Court points out[34] that the British Arrangement Statute

"takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result with more expense and greater delay; for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect and a reorganization * * * under a new name brought about. * * * It is not in conflict with the Constitution of the United States, which, although prohibiting *States* from passing laws impairing the obligation of contracts, allows Congress 'to establish * * * uniform laws on the subject of bankruptcy throughout the United States'." (Italics are the author's.)

While it is true that some of our federal decisions contain language showing that the court, as such, has no power to displace the lien of mortgage creditors,[35] none of these cases deal with the situation which would exist if Congress should see fit to legislate as has Parliament. The only case, it is believed, in which that problem has been squarely considered by our Supreme Court is the one just quoted from. And that case, it is submitted, establishes that an enlargement of the Bankruptcy Act along the lines of the

[33]At p. 536.

[34]At p. 539.

[35]Guaranty Trust Co. *v.* Chicago Union Traction Co. (C. C. 1907) 158 Fed. 931; Merchants' Loan & Trust Co. *v.* Chicago Rys., *supra*, footnote 7.

British Arrangements Act would be constitutional as to all classes of creditors and stockholders.

III. Conclusion.

The Federal Constitution not only empowers Congress to enact a bankruptcy statute, but also "to make all laws necessary and proper for carrying into execution such an act". The Supreme Court has laid down the principle that upon this subject Congress has "an extensive discretion"; that governmental regulations over reorganizations, even to the extent of taking from mortgage creditors their security, do not "deprive a person of his property without due process of law"; that the fact that contract obligations are thereby impaired does not render such legislation invalid; that the submission of the minority to the will of the majority, when that will is fairly exercised and its action approved by the court is fully within the powers of Congress.

The British Parliament, mindful, it may be assumed, of Magna Charta and the Bill of Rights, has enacted laws sanctioned and found workable through almost a half century of unbroken and unquestioned judicial approval. The rule of share and share alike thus established in England is the only just and sensible one.

The title of this article is therefore a misnomer. The scheme proposed is no new one, no visionary experiment, but an old system well tested in the land whence we have derived our jurisprudence. By a simple amendment of the Bankruptcy Act the British results may be made ours.

A brief statute, attaining such ends, could be formulated. It should vest in reorganization receivers such title as the Bankruptcy Act now confers on trustees, thus obviating the need of ancillary receiverships. It should provide a simple machinery for limited and speedy appeals, thus ending improper obstructive tactics, while giving honest minorities an effective day in court. It should do away with expensive foreclosures and with sales of doubtful validity, and give the court plenary supervision over the plan and the fees and expenses incident to its consummation. It should permit first liens to be allowed to those whose fresh money rescues the insolvent corporation, and, above all, it should enable a court of equity properly to fulfill one of its greatest functions by enforcing equality on all.

To say that the methods now in use have broken down is perhaps an exaggeration; for the ingenuity of counsel and the open-

mindedness of progressive judges have combined to find ways of carrying through many successful reorganizations in the past quarter of a century. But the Boyd case, if nothing else, has pointed out the evils, the dangers and the inadequacies of the present system.

It is to the leaders of the American Bar that the great and difficult problems of corporate reorganization are entrusted. In their solution the lawyer finds his largest field for bringing into play, not merely the arts of advocacy, but the greater science of constructive application of the law. It is to those leaders of the Bar, therefore, that we may, in these days of candid re-examination of hitherto accepted processes, look confidently for study of the problems here discussed and for the presentation to Congress of a statute whereby the rubbish of an outworn system may be cast aside for a plan consonant with good sense and justice. And, if so long ago as 1883, the Supreme Court, in considering the British Statute was not frightened by the bogey, due process of law, may it not reasonably be expected that that great Court, always responsive to the economic development and needs of this country, will approve similar American legislation?

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